

General Counsel's Supplemental Report
Public Employment Relations Commission
January 1--April 19, 1996

Robert E. Anderson
General Counsel

A new interest arbitration statute has been enacted. The New Jersey Supreme Court affirmed one Commission decision during this period and the Appellate Division affirmed three decisions, reversed one decision, and dismissed one appeal. A Chancery Division judge enforced one agency order.

Interest Arbitration

A. New Statute

On January 10, 1996, Governor Whitman signed the Police and Fire Public Interest Arbitration Reform Act. *P.L. 1995, c. 425*. This law revises the interest arbitration law codified at *N.J.S.A. 34:13A-16 et seq.* A synopsis follows, but the reader must rely on the text of the law rather than this synopsis.

Section 1 provides a name for the interest arbitration statute: the Police and Fire Public Interest Arbitration Reform Act.

Section 2 modifies the legislative declaration of public policy. The Legislature recognizes the unique and essential duties police officers and firefighters perform and the life-threatening dangers they face. The interest arbitration procedure is declared

to promote the well-being and benefit of New Jersey citizens as well as the high morale of employees and the efficient operation of police and fire departments. That procedure is meant to ensure that the arbitrators recognize and consider the interests and welfare of the taxpaying public and the impact of their decisions on the public interest and welfare.

Section 3a changes the dates for commencing negotiations, filing interest arbitration petitions, and notifying the Commission of agreed-upon terminal procedures. Negotiations must begin at least 120 days before a collective negotiations agreement expires and the parties must meet at least three times within that period unless they agree to postpone the second and third meetings. A violation of these deadlines constitutes an unfair practice. A petition to initiate interest arbitration may be filed on or after the contract expiration date. Within 10 days of a non-petitioning party's receipt of a petition, the parties must notify the Commission as to whether they have agreed upon a terminal procedure.

Subsection 3d establishes the terminal procedure if the parties have not agreed upon one. That procedure will now be conventional arbitration. The arbitrator must separately determine whether the total net annual economic changes for each year of the agreement are reasonable under the eight statutory criteria in subsection 3g.

Subsection 3e establishes the procedures for selecting an arbitrator if the parties have not agreed upon an arbitrator from the Commission's special panel. The Commission shall select the arbitrator (or replacement arbitrator) by lot, without the parties' participation. This subsection also provides that the Commission may suspend,

remove, or discipline an arbitrator for violating statutory provisions or for other good cause.

Subsection 3f(1) changes the procedure for submitting final offers. Final offers must be submitted "on each economic and non-economic issue in dispute."

Subsection 3f(5) sets deadlines for issuing an award. An award must be issued within 120 days of an arbitrator's selection by the parties or assignment by the Commission. An arbitrator may petition the Commission for an extension of not more than 60 days. The parties may also agree to an extension. Arbitrators may be disciplined for violating these deadlines.

Subsection 3f(5)(a) provides that awards may be appealed to the Commission on the grounds that the arbitrator did not apply the statutory criteria set forth in subsection 3g or violated the standards set forth in *N.J.S.A. 2A:24-8* and *24-9*.

Subsection 3g addresses the contents of an award and sets the criteria for deciding a dispute. The award must indicate which criteria are deemed relevant, explain why other criteria are not relevant, and analyze the evidence on each relevant criterion. Specific changes have been made in the criteria for determining comparability; the employer's lawful authority in light of the cap law; and the financial impact on the governing unit, its residents and taxpayers in light of the municipal or county purposes element of the local property tax, the impact of an award on each income sector of property taxpayers, and the impact of an award on a governing body's ability to maintain, expand, or initiate programs or services.

A new section 4 requires the Commission to conduct an annual continuing education program. Every arbitrator must attend that program. Failure to do so for one year may result in discipline; failure to do so for two consecutive years will result in an arbitrator's immediate removal from the special panel.

A new section 5 requires the Commission to promulgate guidelines for determining the comparability of jurisdictions.

A new section 9 requires the Commission to issue an annual survey of private sector wage increases. The first survey must be completed by September 1, 1996.

Section 11 addresses the effective date of the Act. The Act takes effect immediately and applies to all negotiations except those formal arbitration proceedings in which the arbitrator took testimony before January 10, 1996. If testimony was taken before that date, the parties will continue to use the terminal procedure in effect when the hearing began. If testimony was not taken by that date, conventional arbitration will be the terminal procedure absent an agreed-upon alternative. Any selection of an arbitrator or agreement upon a terminal procedure made before January 10, 1996 will continue to be effective.

B. Regulations

The Commission has proposed regulations to implement the new statute. The proposals were published at 28 *N.J.R.* 3121; a public hearing was held on April 3, and comments were submitted by April 18. At its April 25 meeting, the Commission considered the proposed regulations and comments.

In addition, the Commission has proposed a fee schedule for filing petitions and appeals, 28 *N.J.R.* 4(1), comparability guidelines, and a rule on motions to disqualify an interest arbitrator from hearing a case. The comparability guidelines and disqualification rule will be published in the May 6 edition of the *New Jersey Register*. The Commission plans to propose readoption of its chapters of mediation, factfinding, grievance arbitration, and interest arbitration rules.

C. Cases

In *Aberdeen Tp. v. PBA Local 163*, 286 *N.J. Super.* 372 (App. Div. 1996), an Appellate Division panel vacated an interest arbitration award. The Court found that the award impermissibly cited statements made to the arbitrator in his pre-arbitration capacity as a mediator.

Scope of Negotiations

The Supreme Court has affirmed *New Jersey Turnpike Auth. and New Jersey Turnpike Supervisors Ass'n*, P.E.R.C. No. 93-121, 19 *NJPER* 360 (¶24162 1993), aff'd 276 *N.J. Super.* 329 (App. Div. 1994), aff'd 143 *N.J.* 185 (1996). The Authority suspended a toll plaza supervisor for three days for alleged sexual harassment and the Association demanded arbitration pursuant to a just cause clause. The Court held that the discipline amendment permitted binding arbitration of this disciplinary dispute and the Law Against Discrimination did not prohibit arbitration.

Certification was denied in *State of New Jersey (DEP) and CWA*, 285 *N.J. Super.* 541 (App. Div. 1995), cert. den. __ *N.J.* __. That case is discussed at pages 4-5 of my annual report. The Appellate Division then summarily affirmed a Commission's decision

in a companion case, *State of New Jersey (DEP) and Local 195, IFPTE, AFL-CIO*, P.E.R.C. No. 96-27, 21 *NJPER* 388 (¶26238 1994), aff'd App. Div. Dkt. No. A-1850-95T5 (3/22/95), pet. for certif. pending.

Unfair Practice Cases

The Appellate Division has affirmed *Atlantic City Ed. Ass'n and Atlantic City Bd. of Ed.*, P.E.R.C. No. 95-98, 21 *NJPER* 216 (¶26136 1995), App. Div. Dkt. No. A-6101-94T1 (3/6/96). The Commission dismissed a charge alleging that the Board could not unilaterally require teachers seeking to transfer to a new high school to submit references and essays and to be interviewed by a committee including students and community members.

Representation Cases

An Appellate Division panel has reversed agency decisions concerning the representational rights of Turnpike Authority employees above the first level of supervision. *New Jersey Turnpike Auth. and AFSCME Council 73, Locals 3912, 3913, and 3914*, App. Div. Dkt. Nos. A-1646-93T5 and A-1302-94T5 (3/20/96), rev'g P.E.R.C. No. 94-24, 19 *NJPER* 461 (¶24218 1993) and D.R. No. 94-29, 20 *NJPER* 295 (¶25149 1994). The Court concluded that the statutory exclusions of "managerial executives" and "confidential employees" set forth in *N.J.S.A.* 34:13A-3(f) and (g) are broader than the Commission has held for 20 years. In particular, the Court held that private sector tests apply in determining who is a managerial executive and that employees gathering cost data and critiquing contract provisions affecting lower-level employees in different

negotiations units may be considered confidential. The majority representatives have notified the Supreme Court of their intent to petition for certification.

The same panel has affirmed a Commission decision denying representational rights under the Employer-Employee Relations Act to investigators in the Division of Criminal Justice. *In re Division of Criminal Justice State Investigators*, __ N.J. Super. __ (App. Div. 1996), aff'g P.E.R.C. No. 94-113, 20 NJPER 256 (¶25127 1994). The Commission held that the investigators are not covered by the Act because N.J.S.A. 52:17B-100(b) deems all Division employees, except for secretarial and clerical personnel, to be confidential employees. The Court affirmed that ruling and then held that this statutory exclusion did not violate the New Jersey and United States constitutions. The right of public employees under N.J. Const. Art. I, ¶19 "to organize, present to and make known ... their grievances and proposals through representatives of their choosing" entitles public employees to join a union, but not to negotiate over their employment conditions.

Enforcement

Judge McGann enforced an order of the Director of Representation in *Middletown Tp. Bd. of Ed. and Middletown Tp. Ed. Ass'n*, D.R. No. 95-31, 21 NJPER 253 (¶26163 1995), order enforced Ch. Div. Dkt. No. MON-C-62-96. That order clarifies a negotiations unit represented by the Association to include a computer associate.

Grievance Arbitration

An Appellate Division panel affirmed an award holding that the employer violated the parties' contract when its Athletic Director failed to interview the only applicant for

a coaching position and persuaded another employee to take that position. The award ordered the employer to pay the grievant the position stipend. *Middletown Tp. Bd. of Ed. v. Middletown Ed. Ass'n*, App. Div. Dkt. No. A-34-94T5 (6/8/95).

Miscellaneous Cases

The Appellate Division has issued three decisions interpreting the Right-to-Know Law and the common law right to inspect public records. In *Keddie v. Rutgers, The State Univ.*, 286 N.J. Super. 285 (App. Div. 1996), the Court required Rutgers to give the AAUP information about its legal expenses in labor and employment cases. Similarly, in *Hunterdon Cty. PBA Local 188 v. Franklin Tp.*, 286 N.J. Super. 389 (App. Div. 1996), the Court ordered the employer to provide a union with copies of its bills for attorneys, arbitrators, or other professionals working on labor relations matters. But in *Home News v. Spotswood Bor. Bd. of Ed.*, 286 N.J. Super. 380 (App. Div. 1996), the Court held that a newspaper did not have a right to inspect a school board's budget planning documents.

In *Dolan v. City of E. Orange Tp.*, 287 N.J. Super. 136 (App. Div. 1996), an Appellate Division panel held that a provisional Civil Service employee is entitled to a hearing before being discharged for alleged misconduct. Further, a determination of guilt may not be based solely on hearsay evidence.

In *Healy v. Fairleigh Dickinson Univ.*, 287 N.J. Super. 407 (App. Div. 1996), an Appellate Division panel rejected a claim that a senior administrator had acquired de facto tenure under the terms of an AAUP contract and a faculty handbook. The Court held inadmissible the opinion of an "expert" on academic tenure about the meaning of

the handbook and concluded that tenure cannot be acquired unless affirmatively granted.

The Appellate Division has held that under *N.J.S.A. 26:3-25.1*, a public health officer who has been employed for five years is entitled to be paid the maximum salary in his or her salary range. *Brown v. City of Jersey City*, App. Div. DKt. No. A-3861-94T3 (4/10/96). However, an employee who has been promoted to a higher labor grade must serve five years before having a statutory right to the maximum pay in that grade.